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APPENDIX A
[Opinion of the Supreme Court of South Carolina (September 14, 2009)]

THE STATE OF SOUTH CAROLINA

In The Supreme Court

Jerome Mitchell, Jr., Respondent,

v.

Fortis Insurance Company, Appellant.

Appeal from Florence County

Michael G. Nettles, Circuit Court Judge

Opinion No. 26718

Heard January 22, 2009 – Filed September 14, 2009

AFFIRMED IN PART; REVERSED IN PART

C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough, of Columbia; J. Boone Aiken, III, and James M. Saleeby, Jr., of Aiken, Bridges, Nunn, Elliott & Tyler, both of Florence; Stephan I. Voudris, of Jorden Burt, of Miami, FL; and Franklin G. Burt, of Jorden Burt, of Washington, DC, for Appellant.

Edward L. Graham, Brian D. Phelan, and Sallie P. Phelan, all of Graham Phelan Law Offices, of Florence, for Respondent.

Elizabeth Van Doren Gray and Tina Cundari, both of Sowell, Gray, Stepp & Laffitte, of Columbia; Gray T. Culbreath, of Collins & Lacy, of Columbia; David T. McDowell and Alana K. Pulaski, both of Bracewell & Guiliani, of Houston, TX; for Amicus Curiae.

CHIEF JUSTICE TOAL: In this case, a policyholder brought causes of action for breach of contract and bad faith rescission against his insurance company, and sought actual and punitive damages for the company's termination of his health care insurance from original issuance on the grounds of a purported misrepresentation. The jury awarded the policyholder $36,000 in actual damages on the breach of contract claim, $150,000 in actual damages on the bad faith rescission claim, and $15 million in punitive damages deriving from the bad faith cause of action. This appeal followed.

FACTUAL BACKGROUND

On May 15, 2001, Respondent Jerome Mitchell, Jr. ("Mitchell"), of Florence, submitted an application for health insurance to Appellant Fortis Insurance Company ("Fortis"). Mitchell, who was seventeen years old at the time, was preparing to attend college and was no longer covered under his mother's health insurance policy. The application required him to answer a medical questionnaire, which included the question: "Been diagnosed as having or been treated for any immune deficiency disorder by a member of the medical profession?" Mitchell answered "no" to this question. Fortis issued Mitchell a health insurance policy.

In April 2002, Mitchell attempted to donate blood to the Red Cross. On May 13, 2002, the Red Cross contacted Mitchell to inform him that his blood had screened positive for HIV. The Red Cross suggested Mitchell get a confirmation test from his personal physician, and Mitchell immediately contacted Dr. Michael Chandler. On May 14, 2002, Dr. Chandler's tests confirmed that Mitchell was HIV positive. That day, one of Dr. Chandler's assistants noted on Mitchell's intake chart: "Gave blood in March – got letter yesterday stating blood tested [positive for] HIV." The handwritten chart note identified Mitchell correctly as eighteen years old, but was erroneously dated May 14, 2001.

Dr. Chandler referred Mitchell to Dr. Kevin Shea, an infectious disease specialist with Carolina Health Care ("Carolina"). On May 23, 2002, Dr. Shea met with Mitchell and recorded Mitchell's medical history as follows:

> Mr. Mitchell is an 18 year old African-American male with no past medical history who apparently tried to donate blood in April of this year. He was noted to be HIV positive. Subsequent confirmation through Dr. Chandler's office included a positive ELISA and Western Blot. He is referred at this time for further evaluation.

Fortis soon received claims for Mitchell's treatment and for the blood testing that indicated Mitchell was HIV positive. Pursuant to company policy in cases involving long-term disease, Fortis launched an investigation to determine whether Mitchell had failed to disclose a pre-existing condition on his policy application.

In June 2002, a Fortis investigator contacted Mitchell to request that he identify his healthcare providers and authorize a medical records release. Mitchell did so, and Fortis contacted Carolina and Dr. Shea to obtain Mitchell's medical records and billing information. Carolina sent Fortis copies of Dr. Chandler's records, Dr. Shea's records, and Mitchell's blood test results.

A Fortis investigator reviewed the records and discovered the erroneously-dated intake note in Dr. Chandler's files. That information was then forwarded to Fortis Senior Underwriter Kate Stephens ("Stephens") for review. Stephens completed a "referral summary" for the rescission committee and recommended that Mitchell's policy be rescinded on the grounds that he had misrepresented his HIV positive status. Stephens's summary referenced the handwritten notation on the intake form as the sole foundation for her recommendation. Some time shortly thereafter, a Fortis employee – in all likelihood Stephens[1] – drafted an addendum to the referral summary, which read:

> The only question misrepresented on the Enrollment form is #20 – "Within the last 10 years has any proposed insured been diagnosed as having or been treated for any immune deficiency disorder." Can't use the question re: AIDS as he does not have AIDS, he has tested positive for the HIV virus. This is the only question I've found that we can use – any other suggestions?

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[1] The addendum was not signed. However, the record strongly supports the conclusion that Stephens was the author, a fact that Fortis neither admitted nor denied.

> Technically, we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?

The referral summary and addendum were sent to Fortis's rescission committee ("the committee"). On September 4, 2002, the committee conducted an approximately two-hour meeting, in which they considered forty-six cases, including Mitchell's. When it came time to consider Mitchell's case, the committee considered Stephens' referral summary and the addendum. The committee voted to rescind Mitchell's policy.

On September 5, 2002, Fortis sent Mitchell a letter informing him that his health insurance policy was rescinded due to a material misrepresentation on his application form. The letter stated that Fortis would "welcome any additional information you may have which would effect [sic] our decision to rescind your policy." Upon receiving the letter, Mitchell attempted to contact Stephens in order to inform her that he had not misrepresented his health status. Mitchell was directed to a customer service representative, who informed him that there was "nothing [the representative] could do" about the rescission.

Mitchell then sought the help of a case manager at the Hope Health free medical clinic. The manager called Stephens to inform her that she had medical records confirming that Mitchell first tested for HIV positive after he had purchased the Fortis policy. The manager offered to send these records to Stephens by fax or mail. Stephens spurned this offer and informed the manager "that there was nothing

she could do at this time."[2] Stephens did not provide any information regarding Mitchell's right to an appeal.

On June 4, 2003, Mitchell's attorney sent Fortis a copy of Dr. Chandler's initial test results along with a letter informing Fortis that Mitchell was first diagnosed with HIV in May 2002. One week later, Fortis advised Mitchell's attorney that it would review his appeal. The rescission committee met to consider Mitchell's appeal. The information before the committee consisted of a single notation that read: "letter from attorney stating that the insured did not misrep[resent] coverage since the first diagnosis of AIDS was 5/14/2002."[3] The committee denied Mitchell's appeal and upheld the rescission.[4]

PROCEDURAL BACKGROUND

On July 21, 2003, Mitchell filed this action for breach of contract and bad faith rescission of his health insurance, seeking actual and punitive damages.

At trial, Mitchell's insurance expert testified that it was Fortis's practice to shut down an investigation once a single piece of evidence was discovered that

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[2] Stephens had a similar conversation with Mitchell's insurance agent, who called to inquire about the rescission at the request of Mitchell's mother. Stephens explained that Mitchell had misrepresented a pre-existing condition on his application form, and provided no information regarding Mitchell's right to an appeal.

[3] This notation was in error, as Mitchell was HIV positive, and did not have AIDS.

[4] Fortis eventually reinstated Mitchell's policy on May 27, 2004, well after the litigation had begun.

would support rescission. Further, Mitchell introduced testimony from Fortis's manager of underwriting and correspondence – Stephens's direct supervisor – who testified that she was "not able to answer" whether she or any of her employees "had a responsibility to find out the truth" about a policyholder's medical conditions. On cross-examination, Fortis's insurance expert conceded that an insurance company has a duty to investigate and find information that may lead to payment of a claim.

In light of this testimony, Mitchell argued that Fortis acted in bad faith in rescinding his policy solely on the basis of the handwritten note from Dr. Chandler's files. Mitchell argued that there was ample countervailing evidence in his medical records to put any reviewer on notice that the handwritten note was erroneously dated.[5] Mitchell contended that the rescission committee, presented with the "addendum," which openly acknowledged that the investigation had uncovered no clear evidence that Mitchell was HIV positive prior to the inception of his contract with Fortis, rescinded Mitchell's policy in the

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[5] Deborah Poston, an employee of Carolina, testified that when Mitchell's counsel notified her on March 8, 2004 that there might be an error on one of the records, she reviewed the medical chart and determined that there was a discrepancy in the date. Poston testified that it took her "five minutes" to verify the correct date. She further indicated that all records are kept chronologically, and that the misdated note was included with 2002 medical records. Other contextual clues included Mitchell's age on the note, which indicated he was eighteen (he would have been seventeen in 2001), the corresponding day and month with the other records from Dr. Chandler's office, and Dr. Shea's referral summary, which Fortis claimed it did not have but Mitchell alleged was in the file.

course of what was likely no more than a three-minute review.[6]

Mitchell also argued that Fortis had tried to conceal evidence of its bad faith and that Fortis had twice sent them an illegible copy of the addendum to the referral form, and that Stephens's call log included no entry for her phone call with the Hope Health case manager. Mitchell questioned Fortis's practice of not maintaining records of its referral forms in the same manner as other company documents.

As to Mitchell's actual and potential harm and the determination of damages, Mitchell presented testimony from a medical expert who testified that without medical treatment, he would contract AIDS in two years and likely die two years after that. Mitchell introduced testimony from a health care expert who testified to the minimum expected costs that it would take to care for Mitchell throughout his life, not including complications from HIV and AIDS. Mitchell also introduced an economist who relied on the health care expert's figures to project a total present value of $1,081,189.40 for Mitchell's treatment and costs.

The jury awarded Mitchell $186,000 in compensatory damages, including $36,000 on the breach of contract claim and $150,000 on the bad faith rescission claim. The jury also awarded $15 million in punitive damages for the bad faith rescission claim.

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[6] Mitchell introduced evidence that forty-five other cases were considered with Mitchell's in a single two-hour meeting. Mitchell thus argued that it was unlikely that the committee spent more than three minutes on any one case, including Mitchell's.

Fortis filed post-trial motions to (1) elect remedies; (2) vacate, or in the alternative, remit the punitive damages award; and (3) for judgment notwithstanding the verdict or, in the alternative, a new trial absolute, or in the alternative, a new trial *nisi remittitur*. The circuit court granted the motion to elect, and Mitchell elected actual and punitive damages on the bad faith cause of action. Following a hearing, the circuit court denied Fortis's remaining motions.

Fortis appealed and we certified the case pursuant to Rule 204(b), SCRAP. Fortis now submits the following questions for our review:

I. **Did the $15 million punitive damages verdict violate Fortis's constitutional right to due process?**

II. **Did the circuit court admit improper evidence at trial?**

III. **Did the circuit court err in denying Fortis's motion for judgment notwithstanding the verdict?**

IV. **Was the jury's verdict a result of passion, caprice, or prejudice?**

STANDARD OF REVIEW

As a preliminary matter, we restate the standard of review appellate courts should apply to a trial court's post judgment due process review of a punitive damages award. We have typically applied an abuse of discretion standard in reviewing a trial court's post judgment review of a punitive damages award. *See Gamble v. Stevenson*, 305 S.C. 104, 112, 406 S.E.2d 350, 355 (1991) ("[O]nly when the trial court's discretion is abused, amounting to an error of

law, does it become the duty of this Court to set aside the award."); *Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 314, 529 S.E.2d 45, 61 (Ct. App. 2000) (evaluating the trial court's post-judgment review and finding "no abuse of discretion in the trial court's conclusions following its review of the jury verdict."). However, changes in the federal case law have persuaded us to adopt a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the United States Supreme Court held that courts of appeal should apply a de novo standard of review to district court determinations of the constitutionality of punitive damages awards. The Supreme Court identified three bases for its promulgation of a de novo review standard. First, the concepts involved in the due process analysis of punitive damages awards are "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Cooper Industries*, 532 U.S. at 436 (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). Second, the due process criteria acquire content only through application, and "independent review is therefore necessary if appellate courts are to maintain control of, and clarify, the legal principles." *Id.* (quoting *Ornelas*, 517 U.S. at 697). Third, "de novo review tends to 'unify precedent' and 'stabilize the law.'" *Id.* (quoting *Ornelas*, 517 U.S. at 697-98). We agree with this analysis.

For the reasons articulated in *Cooper Industries*, we find that determinations of the constitutionality of punitive damages awards are best conducted pursuant to a de novo review. Accordingly, we hold that

our appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award. *Cooper Industries*, 532 at 431.

LAW/ANALYSIS

I. Due Process and Punitive Damages

Fortis argues that the $15 million punitive damages award is so excessive as to violate its constitutional right to due process under the standards set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) (hereinafter "*Gamble*"), and *BMW of North America v. Gore*, 517 U.S. 559 (1996) (hereinafter "*Gore*"). We agree with this conclusion, although our analysis differs substantially from that urged by Fortis.

A. The History of Due Process Limitations on Punitive Damages Awards

The practice of awarding punitive damages originated in principles of common law "to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d 206, 210 (1964). "Punitive damages may properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition." Gore, 517 U.S. at 568. The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that "the punishment should fit the crime." *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (quoting *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.*, 347 F.3d 672, 676 (7th Cir. 2003)).

Nevertheless, "while states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm v. Campbell*, 538 U.S. 408, 416 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417.

Prior to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), the United States Supreme Court had never directly considered the matter of whether a punitive damage award could be so excessive as to violate due process. In *Haslip*, the Court held that a punitive damages award more than four times the amount of compensatory damages did not violate the defendant's due process rights. However, the Court acknowledged that unlimited discretion in the fixing of punitive damages may invite extreme results that violate due process. The Court noted that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id.* at 18. Since *Haslip*, the Court has built a healthy body of jurisprudence that adds substance and context to this area of law. *See TXO Production Corp. v. Alliance Resources*, 509 U.S. 443 (1993) (holding that the harm likely to occur from a defendant's conduct was relevant to the due process inquiry); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (holding that due process requires post-judgment review of a punitive damages award); *Gore*, 517 U.S. 559 (identifying three "guideposts" that assist a due process analysis); *Cooper Industries v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (adopting a de novo standard of review for determining the constitutionality of punitive damages awards); *Campbell*, 538

U.S. 408 (identifying evidence that, if used to support a punitive damages award, will violate due process); *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (holding that a punitive damages award that is based on harm to others violates due process).

The Supreme Court expounded upon *Haslip*'s due process standard in *Gore*, where it held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." *Gore*, 517 U.S. at 575. In *Gore*, the Court first adopted a specific test by which to conduct a due process analysis. The Court established three guideposts that indicate whether the due process requirement of fair notice has been met. In determining the constitutionality of a punitive damages award, *Gore* directed that courts consider: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.* at 575.

Since *Gore*, much of the Supreme Court's punitive damages jurisprudence has focused on the type of evidence that may be used to support a punitive damages award. In *Campbell*, the Supreme Court held that punitive damages awards may not be based on out-of-state conduct and must be related to the plaintiff's injury or damage. "A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive

damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Campbell*, 538 U.S. at 421-22. Furthermore, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423.

Similarly, in *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007), the Court held that a punitive damages award that is based on evidence of harm to persons other than the plaintiff or plaintiffs will violate due process. The Court noted that harm to others may be considered to help show that the conduct that caused the plaintiff's harm also posed a risk to the public, but the jury may not go further and base a punitive damages award on that evidence.

In these cases, the Supreme Court has continued to uphold *Haslip* and further delineate the contours of punitive damages awards that "run wild." *Haslip*, 499 U.S. at 19. Nevertheless, the Court has consistently declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18.

B. Gamble and Punitive Damages Review Under South Carolina Law

Our own jurisprudence has largely tracked the Supreme Court's constitutional pronouncements, beginning with our *Gamble* opinion, which was written in response to *Haslip*. In *Gamble*, we identified eight considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages award. These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or

concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble*, 302 S.C. at 111-12, 406 S.E.2d at 354.

We have said in the past that trial courts must consider both the *Gamble* and the *Gore* factors. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 195, 638 S.E.2d 667, 671 (2006) ("Although we find the punitive damages award was reasonable under the *Gamble* factors, we must also review the trial court's ruling on punitive damages under *Gore*."). However, considerations of judicial economy weigh in favor of a less burdensome and duplicative analysis. We now hold that *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts. With these considerations in mind, we articulate the following test for our courts in conducting a post-judgment review of punitive damages awards.

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 565. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the con-

duct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.[7] *Campbell*, 538 U.S. at 419.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The ratio of actual or potential harm to the punitive damages award is "perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award." *Gore*, 517 U.S. at 580. Although the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Id.* at 425-26. With this in-

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[7] We observe that this analysis adequately encompasses – and obviates the need for – the first four factors of the *Gamble* review, which include the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct.

struction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay.[8] Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

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[8] We caution that trial courts must be careful about considering the net worth of the defendant. Wealth cannot justify an otherwise unconstitutional punitive damages award. *Campbell*, 538 U.S. at 427. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth.

POST-JUDGMENT DUE PROCESS REVIEW IN THE INSTANT CASE

1. Reprehensibility

Turning to the facts of the instant case, we find ample support in the record to establish that Fortis's conduct was reprehensible.

First, Mitchell's harm was economic, rather than physical. This would typically weigh against the reprehensibility of Fortis's conduct. However, this case is unique in that Mitchell's economic harm – the termination of his health insurance policy – exposed him to great risk of physical danger.

Second, this truth is also relevant to the consideration of whether Fortis demonstrated an indifference to Mitchell's life and a reckless disregard to his health and safety. We conclude that Fortis did. The record is clear that a person with HIV, without proper medication, will develop AIDS and die within a relatively short time. But for the free medical services provided by Hope Health, Fortis's conduct would have deprived Mitchell of health insurance for at least three years, during which time his health would have surely deteriorated. The jury could have reasonably inferred from the evidence that Fortis deliberately ignored contextual and other evidence in order to rescind Mitchell's policy on the pretext of a misrepresentation. It was reasonable to conclude, from the evidence presented, that Fortis was motivated to avoid the losses it would undoubtedly incur in supporting Mitchell's costly medical condition. Based upon this evidence, we find that Fortis was deliberately indifferent to its contractual obligations and to Mitchell's health and wellbeing.

Third, Mitchell was financially vulnerable. Again, without the assistance of free medical services, Fortis's actions would have rendered him unable to obtain additional insurance.

Fourth, Fortis's conduct involved repeated acts of deliberate indifference for more than two years. Fortis reinstated Mitchell's policy nearly twenty months after it had been put on notice that the evidence upon which it relied was erroneous. The rescission committee decided to reject Mitchell's appeal even after his attorney contacted Fortis to emphasize the significance of the medical records which demonstrated that Mitchell had not misrepresented his condition at the time he applied for the policy.

Finally, there is ample evidence in the record to support a finding that the harm Mitchell suffered was a result of intentional deceit. Stephens' addendum acknowledged that the investigation yielded no clear evidence to establish that Mitchell's HIV positive status predated his policy with Fortis. The rescission committee, when presented with this information, elected to rescind Mitchell's policy. After the initial rescission, Stephens was contacted by Mitchell, Mitchell's Hope Health case worker, Mitchell's mother's insurance agent, and Mitchell's attorney to inform her that her information was inaccurate. Stephens did not appear at trial, and the jury was justified in drawing a negative inference from her unavailability.

Fortis's refusal to conduct a further investigation suggests that it was aware of its own wrongdoing. Furthermore, the lack of written rescission policies, the lack of information available regarding appeal rights or procedures, the separate retention policies for rescission documents, the omission of the case

manager's call from Stephens' phone log, and the inference evident from the record that Fortis was in possession of Dr. Shea's records as early as the summer of 2002, were all evidence that Fortis tried to conceal the actions it took in rescinding Mitchell's policy.

Based on these findings, we conclude that Fortis's conduct was highly reprehensible and that the imposition of punitive damages was appropriate.

2. Ratio

In reviewing the ratio guidepost, a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff. The Supreme Court squarely addressed this issue in *TXO*, where the petitioner had brought a frivolous claim against the respondent's oil and gas rights in an effort to renegotiate its royalty arrangement with the respondent. 509 U.S. 443. The jury in that case awarded $19,000 in actual damages and $10 million in punitive damages. The petitioner argued on appeal that the 526 to 1 ratio was grossly excessive, but the Supreme Court found that there was ample evidence in the record to support an inference that petitioner was seeking a multimillion dollar reduction in its potential royalty obligation. The Supreme Court held that "it is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. Although the Court did not designate a monetary value to the potential harm suffered by the respondent, it found that even the most

conservative approximations – each falling within a single-digit ratio to the $10 million punitive damages award – did not "jar one's constitutional sensibilities." *Id.* at 462.

Turning once again to the present case, there is ample evidence that Fortis's conduct would have potentially resulted in a great deal of harm to Mitchell if not for the free medical services of Hope Health. In reviewing the ratio guidepost, the circuit court found that because Mitchell's lifetime maximum payout on the rescinded health insurance policy was $6 million, "the potential economic loss to [Mitchell] from the wrongful rescission was thus" at least that amount. However, in this de novo review, we need not – and in this case should not – accept the circuit court's assertion that Mitchell suffered $6 million in potential harm. This figure is unsupported by the evidence and too speculative. Rather, the more appropriate measure of potential harm, supported by the evidence, is the present value of cost for the minimal evaluation and treatment of HIV over Mitchell's lifetime – $1,081,189.40. This figure bears a closer relation to Mitchell's potential risk than the $6 million maximum lifetime payout. It also bears a closer relation to the reprehensibility of Fortis's conduct because this figure represents the minimal pecuniary gain to Fortis in rescinding the policy. For these reasons, $1,081,189.40 is the accurate measure of the potential harm to which Fortis exposed Mitchell and is appropriately considered in evaluating the ratio to the punitive damages award.

The next question we must ask is whether a ratio of 13.9 to 1, based upon the $15 million punitive damages award and $1,081,189.40 in potential harm, is grossly excessive. We conclude that it is.

In *Campbell* , the Supreme Court observed that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee." 538 U.S. at 425. Although the determination of whether a compensatory damage award is "substantial" is necessarily an imprecise and relative inquiry, it is safe to say that Mitchell's $150,000 in actual damages – excluding, for the moment, the $1,081,189.40 in potential harm suffered – is a fairly substantial compensatory damage award in South Carolina.

With that in mind, we find that a 13.9 to 1 ratio, in this particular case, exceeds due process limits. There is ample evidence in the record to support the imposition of punitive damages, and there is no need for further findings of fact. However, in order to determine the proper amount to remit, we must turn to the third *Gore* guidepost, which instructs us to compare the present award to civil penalties imposed in similar cases.

3. Comparative Penalty Awards

Although a thorough review of case law has uncovered no cases on all fours factually with the present case, South Carolina has a substantial, if somewhat dated, history of upholding punitive damages awards against insurance companies that fraudulently rescind their customers' health insurance policies. *See Kinard v. United Ins. Co.*, 237 S.C. 266, 116 S.E.2d 906 (1960) (where the jury awarded $200 in actual damages and $1,300 punitive damages against an insurer who stopped collecting the premiums from the insured, with knowledge from the claims filed and from the agent's observation that the insured was near death, so that the policy would

lapse); *Yarborough v. Bankers Life & Casualty Co.*, 225 S.C. 236, 81 S.E.2d 359 (1954) (where the jury awarded $7.50 in actual damages and $1,000 in punitive damages against an insurer who repudiated a health insurance policy by failing to send a notice of premiums due after the insured filed a claim for gall-bladder trouble, and attempted to have the insured agree to a retroactive rider excluding illnesses resulting from gall-bladder trouble); *Riley v. Life & Casualty Ins. Co.*, 184 S.C. 383, 192 S.E. 394 (1937) (where the jury awarded $36 in actual damages and $1,000 in punitive damages against an insurer who stopped collecting premiums from the insured after it was clear that his health was failing and with the obvious intention to cancel the life insurance policy);[9] *Jamison v. American Workmen Ins. Co.*, 169 SC 400, 169 S.E. 83 (1933) (where the jury awarded $20 in actual damages and $480 in punitive damages against an insurer who stopped notifying the insured when premiums were due after the insured became very ill in hopes that the insured would miss a payment and thereby justify rescission).

In reviewing more recent punitive damages awards, South Carolina courts have most often upheld verdicts on the low end of the single-digit spectrum, but have frequently deviated from this norm in cases involving particularly egregious conduct.[10] *See James*, 371 S.C. at 196-97, 638 S.E.2d at

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[9] These humble verdicts appear quaint in light of today's multimillion dollar awards. Nevertheless, it helps to keep in mind that this $1,000 punitive damages award was imposed for breach of a contract involving only $155 in life insurance, paid at a weekly premium of 25 cents.

[10] Fortis is correct to observe that most of South Carolina's punitive damages awards have been on the low end of the single-

671-72 (upholding a 6.82 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004) (upholding a 2.54 to 1 ratio); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) (upholding a 9.96 to 1 ratio); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (upholding a 28 to 1 ratio). *Cf. Atkinson*, 361 S.C. at 170, 604 S.E.2d at 392-93 (overruling a 127 to 1 ratio).

In our view, the conduct in this case was reprehensible enough to merit an award towards the outer limits of the single-digit ratio. *See Campbell*, 538 U.S. at 425 (observing that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process). Fortis willfully disregarded Mitchell's health and safety, and the jury so found in assessing this punitive damages award. In assessing this remittitur, we place great emphasis upon that consideration.

We therefore remit the punitive damages award to $10 million, resulting in a ratio of 9.2 to 1. We believe a $10 million award in this case satisfies due process and comports with South Carolina law. We are also certain that a $10 million award will adequately vindicate the twin purposes of punishment and deterrence that support the imposition of punitive damages.

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digit-ratio spectrum. That does not mean the constitution requires this to be so.

II. Evidence at Trial

Fortis argues that the judgment should be vacated, or judgment rendered in its favor, because the circuit court erred in admitting certain evidence. We disagree.

A. Other Rescissions

Fortis argues that the circuit court allowed the jury to consider evidence that the rescission committee harmed nonparties to the suit, in violation of its constitutional rights. *See Campbell*, 538 U.S. at 420. Fortis asserts that the jury should not have considered evidence indicating that forty-five other rescission cases were considered with Mitchell's in the course of a two-hour committee meeting. This argument is without merit. It is evident from the record that Mitchell introduced this evidence in order to establish the inference that Fortis could not have spent more than three minutes in deliberating the rescission of Mitchell's policy. Fortis could have defended itself from such evidence had the rescission committee kept minutes in its meetings. The circuit court did not err in allowing this evidence.

B. Post-claim Underwriting

Fortis argues that the circuit court erred in allowing testimony regarding Fortis's retrospective investigation practices, also known as "post-claim underwriting." Fortis asserts that expert testimony indicating that this practice is unlawful in "at least half a dozen states" constituted evidence of out-of-state conduct that violated Fortis's constitutional right to due process. *See Campbell*, 538 U.S. 408. We disagree.

Fortis argues that, as a general matter, post-claim underwriting is "perfectly lawful" in South Carolina. However, in the context of this case, Fortis's post-claim underwriting practices played a pivotal role in the harm inflicted upon Mitchell in South Carolina. This evidence was probative of Fortis's bad faith conduct, and was properly submitted to the jury.

C. Improper Litigation Conduct

Fortis argues that the trial court erred in allowing the jury to consider evidence that Fortis engaged in "improper conduct" following the September 4, 2002 rescission committee meeting on the grounds that "dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Campbell*, 538 U.S. at 422. We disagree for three reasons.

First, the rescission was not final until June 2003 review of Mitchell's "appeal." At a bare minimum, all evidence of concealment until that point is allowable. Second, this evidence is probative of Fortis's bad faith liability, not punitive damages. Lastly, Fortis waived any objection to the admission of evidence of bad acts that occurred after the second rescission committee meeting by: (1) repeatedly emphasizing their own "good act" of reinstatement following the "temporary" rescission, and (2) repeatedly arguing that Mitchell himself acted negligently in failing to submit additional information prior to March 8, 2004.

D. Value of Mitchell's Free Medical Treatment

Fortis argues that the circuit court erred in allowing the jury to consider the value of the free med-

ical care Mitchell received from Hope Health. We disagree.

The value of Mitchell's free medical care is relevant to the determination of damages because the collateral source rule provides that an award for damages should not be decreased if the plaintiff receives compensation for all or part of the damage from a collateral source. *See Haselden v. Davis*, 353 S.C. 481, 579 S.E.2d 293 (2003) (holding that the proper measure of damages is the "reasonable value" of the medical services, even if the plaintiff receives the treatment free or at a discount). In this case, the value of Mitchell's free medical treatment is necessary to the determination of the amount of damage Fortis inflicted upon Mitchell in rescinding his policy.

E. Mitchell's Future Medical Expenses

Fortis argues that the circuit court erred in allowing the jury to consider the value of the Mitchell's future medical expenses. This objection, however, is meritless. This evidence is probative of Fortis's financial motive to rescind Mitchell's policy, and we find it is relevant to Mitchell's allegations of bad faith.

F. Mitchell's Risk of Death Without Appropriate Medication

Fortis argues that the circuit court erred in allowing the jury to consider the risk of death Mitchell faced without treatment, because it was "irrelevant, highly prejudicial, and . . . inflamed the jury." We find this assertion to be entirely without merit. Evidence of the risk Mitchell faced without health insurance coverage is properly admissible to establish

Fortis's reprehensibility and support an award for punitive damages.

III. Fortis's Motion For JNOV

We find it patently clear from the record that there is no support for Fortis's claim that "the evidence as a whole is susceptible to only one reasonable inference" that Fortis was not liable for bad faith rescission of Mitchell's health insurance policy.

IV. Passion, Caprice, And Prejudice

Similarly, we find no credible evidence anywhere in the record to support Fortis's contention that "the jury's $15 million punitive damages award and/or its $150,000 compensatory damages award were the result of passion, caprice, or prejudice, and therefore must be reversed and a new trial ordered."

CONCLUSION

For the forgoing reasons, we affirm the jury's finding of liability on the bad faith cause of action, affirm the $150,000 compensatory damages award, and remit the $15 million punitive damages award to $10 million.

WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

APPENDIX B

[Order of the Court of Common Pleas, Florence County, South Carolina, deciding post-trial motions (July 19, 2006)]

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT

2003-CP-21-1347

JEROME MITCHELL JR., PLAINTIFF,

VS.

FORTIS INSURANCE COMPANY, DEFENDANT

ORDER

[1] Date of Hearing: June 13, 2006

Appearances: Edward L. Graham, Sallie P. Phelan and Brian D. Phelan of the Graham Law Firm, P.A., for Plaintiff;

J. Boone Aiken, III and Jay M. Saleeby, Jr. Of Aiken, Bridges, Nunn, Elliott & Tyler, P.A., for Defendant.

This matter came before the Court on Tuesday, June 13, 2006, for a Hearing on Defendant's Post-Trial Motions. The Motions include: "Motion to Require Plaintiff to Elect Remedies;" "Defendant's Motion to Vacate or, in the Alternative, Remit the Punitive Damages Award under Gamble v. Stevenson;"

and "Defendant's Motion for Judgement Notwithstanding the Verdict or, in the Alternative, for a New Trial Absolute, or, in the Alternative, for a New Trial Nisi Remittitur." Each will be addressed in turn.

I. MOTION TO ELECT REMEDIES

Defendant Fortis Insurance Company (hereinafter, "Fortis") requested the Court to require Plaintiff to elect remedies pursuant to Nichols v. State Farm Mutual Automobile Insurance Co., 279 S.E. 336, 306, S.E2d 616 (1983). Plaintiff acknowledged the requirement to [2] elect remedies, and elected the actual and punitive damages verdicts on the bad faith cause of action.

II. MOTION TO VACATE OR REMIT THE PUNITIVE DAMAGES AWARD UNDER GAMBLE V. STEVENSON

A. GAMBLE FACTORS:

Under the case of Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), this Court is required to review the jury's punitive damages verdict and give consideration to the following eight factors:

1. *Defendant's degree of culpability;*
2. *Duration of the conduct;*
3. *Defendant's awareness or concealment;*
4. *The existence of similar past conduct;*
5. *Likelihood the award will deter the Defendant or others from like conduct;*
6. *Whether the award is reasonably related to the harm likely to result from such conduct;*
7. *Defendant's ability to pay; and*
8. *"Other factors" deemed appropriate.*

The Court will address each in turn.

1. *Defendant's Degree of Culpability.*

Fortis argues that its culpability was limited because of its alleged right to rely upon the [3] erroneous date on the Carolina Family Practice's handwritten office note. Fortis claims that date, May 14, 2001, reasonably led it to the erroneous belief that Plaintiff had tested positive for HIV the day before he applied for his health insurance policy on May 15, 2001. However, the correct date for that office visit and his HIV diagnosis was a year later in May 2002, a year after he had applied for insurance.

Contrary to Fortis' assertion that it reasonably relied on this one handwritten office note in rescinding Plaintiff's health insurance when Plaintiff was faced with a life-threatening illness, the court finds that Fortis' culpability with regard to this case was extreme and outrageous. The insurance contract between the parties created a quasi-fiduciary duty on the part of Fortis toward its insured. Plaintiff paid

his premiums and was entitled to benefits under the policy. When he contracted HIV, that billing code was recognized by Fortis's computer, thereby triggering an automatic investigation for fraud. When the investigation identified one snippet of suspicious evidence of misrepresentation, i.e., the erroneous date on a handwritten office note, Fortis abruptly ended its investigation and rescinded Plaintiff's policy. Fortis ignored other entries on medical records from the same office which put Fortis on notice that the date may be erroneous. Before rescinding Plaintiff's health insurance Fortis did not even call the Plaintiff to offer him the opportunity to respond to Fortis' allegations of misrepresentation by him. An insurance company is entitled to investigate for potential misrepresentation, but discovery of suspicious information should cause a fair, impartial and thorough investigation to be conducted, not for an investigation to end just because it serves the insurance company's interest in crafting a reason to rescind an insured's policy.

The handwritten office note on which Fortis argues it had a right to rely is unreliable for [4] several reasons. The office note showed that Plaintiff was 18 years old, which was his correct age on May 14, 2002, but not a year earlier. The record neither contained a diagnosis of HIV from a physician nor did it report specific laboratory test findings. Furthermore, it did not reveal the source of the letter telling Plaintiff he had HIV and did not indicate what specific information led to the letter being written to the Plaintiff. Moreover, Fortis' billing records alone should have given notice to Fortis that the 2001 date was incorrect. Fortis had bills from May 14, 2002 for drawing Plaintiff's blood and for the lab testing which led to the confirmed diagnosis of HIV, while Fortis had not

received a single bill for diagnostic testing or treatment of HIV during 2001 or before May of 2002. Fortis had no medical record to match up with the May 14, 2002 bill. The other medical records from 2001 and 2002 which Fortis admits reviewing did not contain any indication whatsoever that Plaintiff had been diagnosed or treated for HIV.

Not only did Fortis choose to rely on one false and unreliable snippet of information containing an erroneous date to the exclusion of other information which would have revealed that date to be erroneous, Fortis refused to conduct any further investigation even after it was on notice the evidence which aroused its suspicion may be false. Despite being called by the Plaintiff, the local agent, and Mary Wiggins, who was Plaintiff's counselor at Hope Health, Fortis chose to consider the rescission a closed issue. Mary Wiggins provided compelling testimony on that subject. Ms. Wiggins testified that she telephoned Kate Stephens, the Fortis employee who sent the rescission letter to Plaintiff. Ms. Wiggins testified she explained to Kate Stephens that Plaintiff did not know that he had HIV until May 2002, and that she had the medical records to prove it. She further testified that she offered to fax those records to Kate Stephens, but that Kate Stephens declined. She described Ms. Stephens' tone of voice in that [5] conversation as being rude. There was testimony that Kate Stephens told Mary Wiggins that she already had all the information that she needed.

In June 2003, one of Plaintiff's attorneys, Sallie Phelan, wrote Kate Stephens to again inform her that Plaintiff did not know he had HIV until May 2002. That letter enclosed a copy of the lab report

dated May 14, 2002 which established the diagnosis, and which contained a handwritten note referring Plaintiff to Dr. Shea, an infectious disease specialist. That letter demanded reinstatement as well as a monetary settlement. Despite the contents of that letter and its enclosure, Fortis chose to stand by its rescission and failed to conduct any further investigation to ascertain the facts of the timing of Plaintiff's HIV diagnosis and treatment. This is especially telling of Fortis' wrongful and bad faith handling of Plaintiff's policy given that Fortis had authorization to obtain the medical records which would have easily revealed the error of Fortis' position that Plaintiff had misrepresented his health on his application.

The video deposition testimony of Barbara Delgadillo, Fortis' underwriting manager, also speaks volumes about the extreme culpability of Fortis. Ms. Delgadillo was the supervisor of Kate Stephens when Ms. Stephens made the recommendation to rescind Plaintiff's policy.

By relying on the erroneous date when it had ample notice from numerous sources that the date was not accurate or reliable, the court finds that Fortis acted without regard for the rights of the Plaintiff. According to the uncontroverted testimony in this case, but for the free health care Plaintiff received at Hope Health, Plaintiff's HIV would have become AIDS in two years; and if his AIDS were untreated, he would have most likely died within one to two years thereafter.

The evidence shows Fortis was faced with exposure to very high claims from Plaintiff [6] when Fortis decided to rescind his health insurance. Fortis faced the present value of cost for minimal evaluation and treatment of HIV over Plaintiff's lifetime of

approximately $1,080,000 (One million, eighty thousand dollars), plus possible claims for treating AIDS, plus the usual claims for various illnesses and injuries that may arise for any customer. Fortis faced the risk of up to a maximum cost of the policy's $6,000,000 (Six million dollars) lifetime benefit limit. the court finds that in rescinding the policy without a good faith, impartial and thorough investigation, Fortis was motivated to rid itself of costly claims from a customer with a medical condition that would be expensive to treat. The court finds Fortis wrongfully elevated its concerns for maximizing profits over the rights and interests of its customer.

The court also finds Fortis' efforts to blame Carolina Family Practice, the Plaintiff and his agents evidence of Fortis' great degree of culpability in this case. It is not the Plaintiff's duty to investigate for Fortis. Moreover, Fortis' lack of documentation of its actions in rescinding and upholding the rescission of insureds' policies, as well as the cursory review which is conducted of these policies, evidence Fortis' course of conduct in rescinding health insurance policies without proper investigation and review.

Fortis gambled with Plaintiff's life. Fortis gambled about whether Plaintiff would have the resources and fortitude to proceed with legal action against Fortis and maintain the action through a jury trial. the court finds Fortis' actions in this case were reprehensible, and justify the jury verdict of $15,000,000 (Fifteen million dollars) in punitive damages.

2. Duration of Conduct.

[7] On September 5, 2002, Fortis rescinded Plaintiff's policy retroactively to the policy's incep-

tion date of May 15, 2001. Fortis' letter reinstating the policy is dated May 27, 2004. Plaintiff's policy was thus rescinded in excess of three years. The court finds the duration of the rescission supports a high award of punitive damages.

Fortis repeatedly chose to cling to its assertion that Plaintiff had misrepresented his condition on May 15, 2001, yet Fortis was on notice from multiple sources that its information about the date of diagnosis was incorrect and unreliable. Despite telephone calls from Plaintiff, the local sales agent and Mary Wiggins, Fortis refused to acknowledge even the possibility of its error and refused to conduct any additional investigation. When Fortis received the letter and enclosed Labcorp report from attorney Sallie Phelan in June 2003, Fortis did not conduct any further investigation, but stood by its rescission. It was not until May 27, 2004, approximately twenty months after Fortis had been put on notice of its error by the Plaintiff and his agents, that Fortis reinstated the policy.

Throughout trial, Fortis not only blamed Carolina Family Practice for writing an erroneous date, but also tried to blame the Plaintiff's lawyers for not providing Fortis with additional medical records they had obtained as an enclosure with a letter dated June 4, 2003. Fortis made repeated contentions during trial that it reinstated the policy just as soon as it finally received records showing the May 2001 date was incorrect. In fact, the evidence proves that Fortis obtained Dr. Shea's records in discovery in November 2003[1] and chose not to reinstate the policy

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[1] An inference could be made that Fortis had Dr. Shea's records since the summer of 2002. See infra p. 10, line 14–p. 11, line 2.

until May 27, 2004. the court finds the duration of misconduct supports a large punitive damages award.

3. [8] Defendant's Awareness or Concealment.

The evidence proves that Fortis' employees were aware there was no sound basis to rescind Plaintiff's policy. The Addendum attached to the referral form written by Kate Stephens, the underwriter recommending rescission, is most telling of Fortis' recognition and awareness that there was no substantial basis to support rescission of Plaintiff's policy. The Addendum provides as follows:

> Technically, we do not have the results of the HIV test. This is the only entry in the medical records regarding HIV status. Is this sufficient?

The Addendum also asks the rescission committee if they have any other suggestions as to a basis for rescinding the Plaintiff's policy. The Addendum reveals Fortis' awareness that there was no lab report and no diagnosis by a physician to support Fortis' rescission based on misrepresentation.

The refusal to objectively conduct further investigation into the facts also suggests an awareness of wrongdoing. Fortis refused to investigate further despite being told numerous times that its decision was based on erroneous information. Telling Mary Wiggins not to fax records which would have forced Fortis to reverse the rescission is compelling proof of Fortis' awareness of wrongdoing. Such awareness supports a large amount of punitive damages.

The evidence proves Fortis attempted in numerous ways to conceal its actions. There were no written policies and procedures at Fortis for (a) under what facts and circumstances recommendations about possible rescission should be made; (b) how recommendations for rescission should be acted upon; or (c) activities of the rescission committee. No minutes were [9] kept of actions, votes, or any business conducted during the rescission committee's meeting.

Additionally, evidence was presented that Fortis conceals an insured's rights to challenge a rescission by not providing any information to its customers about appeal rights and procedures at the time of rescission. In this case, Fortis did not even inform Plaintiff that he had appeal rights despite several communications with the Plaintiff or his agents questioning the rescission, nor did Fortis advise Plaintiff he would have to appeal in writing. Moreover, there were no written policies or procedures to govern the appeal process at Fortis. There was testimony that Fortis had grievance procedures for existing customers, but not for Plaintiff. Once his policy was rescinded and he was no longer considered a customer, Plaintiff was no longer permitted to make a grievance.

There was also evidence presented that Fortis conceals information through its document retention practice. Fortis' stated policy for the last nine years has been to microfilm and destroy all documents. However, a document presented at trial contained language at the foot of the document which stated: "FOR INTERNAL USE ONLY. DO NOT MICROFILM." Carol Judd, Fortis' Director of Imaging, could not explain that contradiction, nor could she

answer how many other documents relating to Plaintiff were marked for internal use only and not microfilmed. There was also evidence that documents and/or other records regarding Plaintiff's policy were deleted; and that telephone logs and recordings contained key omissions. Fortis provided no explanation of why Mary Wiggins' call with Kate Stephens was not logged or recorded when Kate Stephens' other telephone calls that same day were both logged and recorded. Kate Stephens was not called as a witness. A jury could easily infer that Fortis destroyed and/or concealed any documentation of Ms. Wiggins' phone call when relatively [10] generic and benign calls were recorded, but a call which would be potentially harmful to Fortis that took place on the same day with the same Fortis employee was neither logged nor recorded.

There was also evidence from which the jury could have inferred that Fortis originally had the May, 2002 lab report and records from Plaintiff's treating physician, Dr. Shea which definitively established the date of Plaintiff's diagnosis and treatment in 2002; but which Fortis chose to ignore and conceal when it decided to rescind the policy. Debra Poston, custodian of Plaintiff's Carolina Family Practice medical records, testified that when Fortis requested records from her office, the records consisted of eight pages, the five pages Fortis admitted having, plus the Labcorp report dated May 14, 2002, plus a two page report from Dr. Shea dated May 23, 2002. Ms. Poston testified that those eight pages would have ordinarily been supplied to Fortis unless Fortis specifically requested less than all of the medical records. Moreover, Fortis requested only itemized bills directly from Dr. Shea, but no records. An infe-

rence may be drawn that Fortis did not need Dr. Shea's records, because Fortis already had them.

Fortis also concealed its actions in the manner with which documents were provided to Plaintiff. The Addendum document was originally produced to Plaintiff's counsel in a completely illegible form. When Plaintiff pressed repeatedly through discovery motions for a legible copy, only marginally better copies were produced. Yet in January 2006, Ms. Judd produced clear and legible copies of the Fortis file during her deposition, which she testified took her ten minutes or less to obtain. Those copies were made from the original microfilm kept steps from her office. Much greater effort was necessary to obtain the illegible copies furnished to Plaintiff.

Plaintiff presented substantial evidence from which a jury could infer a pattern of [11] secrecy and concealment by Fortis in this case. That also supports a high award of punitive damages.

4. The Existence of Similar Past Conduct.

On at least four different occasions, Fortis ignored the Plaintiff and his agents' attempts to inform Fortis that it wrongfully rescinded the Plaintiff's policy. On these same occasions, Fortis repeatedly failed to notify Plaintiff that he had any rights to appeal Fortis' decision to rescind his health insurance.

In addition to these acts towards the Plaintiff, there was evidence that Fortis has for some time been making recommendations for rescission, and acting on those recommendations, without a good faith investigation conducted fairly and objectively. The evidence shows that Fortis does not obtain the base-line medical records for all applicants who apply for Fortis' health insurance. Instead, Fortis pre-

programmed its computer to recognize billing codes for expensive health conditions, which triggers an automatic fraud investigation by its "Cost Containment" division whenever such a code is recognized. For as long as Fortis' computers have been programmed to do so, Fortis has started an investigation of its insured, not because of anything suspicious in the application or based upon any actions of the insured, but because a customer contracted a potentially expensive illness or condition. Only then does Fortis obtain medical records, looking for any basis upon which to rescind a policy.

Evidence was presented that Fortis has never had written policies and procedures about when rescission should be recommended; how such recommendations should be acted upon; nor [12] the actions of the rescission committee. There was evidence that Fortis' general counsel insisted years ago that members of the rescission committee not record the identity of the persons present and involved in the process of making a decision to rescind a Fortis health insurance policy. The evidence shows that Fortis' rescission committee spent very little time reviewing its rescission decisions, but rather merely rubber-stamped the rescission recommendation. Fortis' rescission committee also did not call insureds during this process to learn the insured's position, nor did anyone else at Fortis call the insureds to inform them about appeal matters.

The fact that Fortis has engaged in similar past conduct is another factor which justifies a relatively high award of punitive damages. Prior wrongful conduct by Fortis in this case includes stopping fraud investigations when any suspicious evidence is found, absence of effective procedures governing res-

cission, and keeping customers in the dark about appeal matters. The probability of Fortis repeating such conduct in the future absent an award of punitive damages is clear.

5. Likelihood the Award Will Deter the Defendant or Others From Like Conduct.

The court finds the jury verdict on punitive damages will likely deter the Defendant and other insurance companies from similar acts of bad faith. Absent a sizeable award of punitive damages, it is unlikely that Fortis or other insurance companies would be motivated to avoid such misconduct in the future.

6. Whether the Award is Reasonablely Related to the Harm Likely to Result from Such Conduct.

[13] The Court finds the jury verdict on punitive damages is reasonably related to the harm likely to result from the misconduct by Fortis. Fortis disregarded the effect its rescission would have on Plaintiff's health. Plaintiff's current treating infectious disease specialist, Dr. Zaw Htay, testified that had Plaintiff not been able to receive free medical care for his HIV from Hope Health, Plaintiff's HIV would likely have become AIDS within two years; and if his AIDS were untreated, Plaintiff's death was likely within another one to two years. But for the free medical care Plaintiff obtained from Hope Health, Plaintiff would have suffered a decline in his health leading to his untimely death. Accordingly, the court finds the punitive damages award is reasonably related to the harm likely to result from such conduct.

7. Defendant's Ability to Pay.

The court finds that Fortis is able to pay the punitive damages award. Testimony provided by Dr. Oliver Wood, a renowned expert in South Carolina on the financial standing of corporations, proves that Fortis has ample resources to pay the punitive damages verdict. As of March 2005, the last date for which such information was available to Dr. Wood, Fortis' capital surplus or net worth was $296,364,000 (Two hundred ninety-six million, three hundred sixty-four thousand dollars). Records from the South Carolina Department of Insurance certified that in December of 2005, Fortis had excess capital reserves, above that required by South Carolina law to operate as a [14] health insurance company within this state, of $256,996,066 (Two hundred fifty-six million, nine hundred ninety-six thousand and sixty-six dollars). Dr. Wood testified that Fortis' earnings in 2004 were approximately $127,774,000 (One hundred twenty-seven million, seven hundred seventy-four thousand dollars). Dr. Wood further testified that Fortis was able to pay its shareholders dividends of $40,000,000 (Forty million dollars) in 2004, and $271,000,000 (Two hundred seventy-one million dollars) over the four years ending in 2004. Dr. Wood also testified that even apart from its normal business activities, Fortis earned $36,191,000 (Thirty six million, one hundred ninety-one thousand dollars) per year in 2004 in its net investment income alone. That represents the sum of $695,981 (Six hundred ninety-five thousand, nine hundred eighty one dollars) per week. Net investment income for the first three months of 2005 was $10,477,000 (Ten million, four hundred seventy-seven thousand dollars), the equivalent of $805,923 (Eight hundred five thousand, nine hundred twenty-three dollars) per week. Based on

these facts and figures, it is obvious that Fortis has the ability to pay the punitive damages award.

8. "Other Factors" Deemed Appropriate.

As the court observed the witnesses' demeanor, listened to their tone of voice, and reviewed the documentary evidence in this case, the court was struck by what a callous attitude Fortis exhibited toward the Plaintiff. He did nothing wrong, but they investigated him for fraud because he contracted HIV. Although the Plaintiff did nothing suspicious himself to [15] warrant an investigation for fraud, the company chose to stop its investigation once it located and latched onto a suspicious entry on a handwritten note from a medical office taken out of context. Fortis refused to pay benefits under the insurance contract for Plaintiff's HIV evaluation and treatment without conducting a fair, objective and thorough investigation to see if the date on the handwritten note was accurate and reliable. Fortis did not even give the Plaintiff the courtesy of a telephone call to ask for his side of the story.

When Fortis finally reinstated Plaintiff's policy and offered to pay medical bills Plaintiff incurred during the time when he had no health insurance, Fortis acted as though it deserved to be applauded for a generous offer. The obvious reality, however, is that there were minimal medical expenses incurred by Plaintiff after he learned that Fortis had rescinded his policy. Yet on several occasions during trial, Fortis brought up its offer to reimburse Plaintiff for his minimal bills. When faced with the prospect of the value of the Hope Health treatment, however, Fortis argued that it should not be responsible for those costs as the Plaintiff did not have a legal obligation to repay Hope Health. Fortis' offer to

reimburse Plaintiff's minimal health costs after rescission stands in stark contrast to its position that it should not be responsible for the value of Plaintiff's medical care at Hope Health. This juxtaposition exemplifies Fortis' insincerity and failure to acknowledge the grave consequences of its misconduct. The court finds and conclude that these other factors and considerations serve as additional justification for the jury's $15,000,000 (Fifteen million dollars) punitive damages verdict.

B. GORE FACTORS:

[16] Under State Farm Mut. Auto Ins. Co. vs. Campbell, 568 U.S. 408 (2003), and BMW of North America, Inc. vs. Gore, 517 U.S. 559 (1996), this Court must also review the punitive damages with regard to the following three guideposts:

1. *the degree of reprehensibility of the Defendant's misconduct;*
2. *the disparity between the actual or potential harm suffered by the Plaintiff and the punitive damages award; and*
3. *the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (Emphasis added.)*

1. *Decree of Reprehensibility.*

Reprehensibility analysis is essentially the same as culpability analysis under South Carolina Law. In State Farm v. Campbell, supra, the U. S. Supreme Court directed courts to determine reprehensibility by considering whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of

the health and safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 538 U.S. at 419, 123 S. Ct. at 1521. Plaintiff was vulnerable both financially and in terms of his health. For that reason and the reasons the court found Fortis' culpability to be extreme and outrageous, the court finds its misconduct to be highly reprehensible. See paragraph, II A (1) supra.

2. Disparity Between the Actual or Potential Harm Suffered by the Plaintiff in the [17] Punitive Damages Award.

Fortis argues that the punitive damages verdict is unconstitutionally excessive because it is one hundred times the compensatory damages award. That argument is wrong for two reasons.

First, that argument ignores the United States Supreme Court's steadfast refusal to create a bright line by which to evaluate the ratio of punitive damages to actual or potential damages. As stated in State Farm vs. Campbell, supra, : "[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." 538 U.S. at 424-425, 123 S.Ct. at 1524 (Emphasis in original). The Court further clarified: "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" 538 U.S. at 425, 123 S. Ct. at 1524.

Second, Fortis' argument ignores that the United States Supreme Court, when discussing ratios, defines the appropriate values underlying the ratio analysis to be a comparison of the punitive damages award to the actual or *potential* harm suffered by the Plaintiff. Whether reckless, willful wrongdoing, in conscious disregard of the Plaintiff's rights, is subject to a significant award of punitive damages depends not on the actual damages awarded by the jury but the potential harm to the Plaintiff from that wrongful conduct. When a wrongdoer acts in such a way as to create a risk of potentially catastrophic injuries, losses and damages, the mere fact that a Plaintiff was fortunate to avoid the worst potential harm or mitigated his damages through his own efforts, should not shield the wrongdoer from exposure to a high punitive [18] damages award. In this case Fortis should not benefit from the Plaintiff's mitigation of his damages by obtaining free medical care. But for Plaintiff obtaining that care, his actual damages would have been dramatically increased. This principle was recognized by the United States Supreme Court in the case of TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711 (1993), in which the jury had awarded $19,000 (Nineteen thousand dollars) in actual damages and $10,000,000 (Ten million dollars) in punitive damages. Although the ratio between the punitive award and the award of actual damages was 526 to 1, the ratio of punitive damages to *potential* damages was recognized to be substantially lower, no more than ten to one. Because of that consideration, the U.S. Supreme Court determined the award of punitive damages in TXO Production to be constitutionally permissible. As the court noted:

> It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. 509 U.S. at 460, 113 S.Ct. at 2721-2722 .

Moreover, Fortis also fails to recognize that Plaintiff could have contracted another illness or suffered serious injuries in an accident that would have been covered by the policy but for the rescission. This type of occurrence should also be considered in analyzing the potential harm of Fortis' actions.

In this case, the Plaintiff's policy which was wrongfully rescinded had a $6,000,000.00 (Six million dollar) lifetime maximum payout. The potential economic loss to Plaintiff from the wrongful rescission was thus at least $6,000,000.00 (Six million dollars). This is especially true given Plaintiff's relatively young age at the time of the recission. Moreover, Plaintiff would [19] have faced a grievous illness and miserable death had he been unable to obtain free medical care. As Dr. Htay clearly testified, Plaintiff's HIV condition in May, 2002 was such that, absent treatment, it would have progressed to AIDS within two years; and his AIDS, if untreated, would have resulted in death within one to two years thereafter. Fortunately, Plaintiff avoided AIDS and an untimely death by seeking and receiving free medical care through Hope Health. The potential harm likely from Fortis' wrongful rescission, however, must take into account that Fortis gambled with the Plaintiff's health and life knowing that he had a serious and deadly condition. Therefore, the potential

harm from Fortis' wrongdoing includes the catastrophic progression of HIV to AIDS, and further progression from AIDS to painful, wretched deterioration and ultimate death. The courts in this state have recognized that the wrongful death of a twelve year old child under less gruesome circumstances merited compensatory damages of $3,000,000.00 (Three million dollars). Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000); Knoke v. South Carolina Dept. Of Parks, Recreation and Tourism, 324 S.C.136, 478 S.E.2d 256 (1996). It is not unreasonable to conclude that the potential harm to Plaintiff or anyone similarly situated from the wrongful rescission by Fortis would have a value in the range of at least three to six million dollars or more.

Comparing the punitive damages verdict to the potential harm numbers presented above (Six million dollar lifetime medical benefits; Three million dollars for the death of a twelve year old), the resulting ratio of punitive damages to potential harm is no more than between five to one and two and a half to one. Both of these ratios are well within the guidelines approved in other cases by both the U.S. Supreme Court and the appellate courts of South Carolina. See, e.g., TXO Production, supra; Collins Entertainment Corp. v. Coats and Coats Rental [20] Amusement, 2005 WL 3954000 (S.C. 2006); Hundley, supra; Taylor v. Medinica, 324 S.C. 200, 479 S.E.2d 35 (1996); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996).

3. Difference Between the Punitive Damages Awarded by the Jury and the Civil Penalties Authorized or Imposed in Comparable Cases.

Fortis argues that the third Gore guidepost requires the Court to measure the punitive damages verdict against fines which can be imposed by the South Carolina Department of Insurance. Even though the Department of Insurance may cancel Fortis' insurance license in South Carolina under certain circumstances, Fortis argues that the value of its insurance license should not be properly considered, claiming there was no evidence of repeated misconduct by Fortis in South Carolina to justify the loss of its license. That argument misses the point.

In reviewing this third Gore guidepost, this Court is not limited to considerations of monetary administrative fines which might be imposed by the Department of Insurance. The South Carolina Supreme Court recognized in the case of Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385 (2004) that the third guidepost of Gore requires the court to compare the subject punitive damages award with other civil penalties which may be imposed in comparable cases, including awards of punitive damages in civil litigation. 604 S.E.2d at 171. As noted above, the amount of the punitive damages award in this case compares favorably with other awards which have been upheld in South Carolina and other states, particularly when the focus is properly placed on the potential harm to Plaintiff and others similarly situated.

[21]For the reasons stated, the court is convinced that the jury verdict on punitive damages in this case was just and proper. My review of the Gamble

factors as well as the Gore guideposts leads me to conclude that the amount of the award is justified by the culpability and reprehensibility of Fortis' misconduct, by the callous and reckless disregard Fortis exhibited for the Plaintiff's health and life, and by the other facts and circumstances mentioned above. For example, if the jury had awarded only ten times the actual damages verdict, or $1,500,000.00 (One million, five hundred thousand dollars), that would represent a victory for Fortis. Fortis and other insurance companies would be encouraged to engage in similar bad faith conduct in an attempt to avoid costly medical treatment claims when facing the potential costs of a projected lifetime medical treatment plan of $1,080,000.00 and policy limits of $6,000,000.00. In my opinion the purposes of a punitive damages award could not be realized in this case without a substantial award of punitive damages such as that awarded by the jury.

III. MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, FOR A NEW TRIAL ABSOLUTE, OR IN THE ALTERNATIVE, FOR A NEW TRIAL NISI REMITTTITUR.

Defendant contends there was no evidence of bad. faith or unreasonable action in rescinding the policy. Defendant relies on the cases of Howard v. State Farm Mut. Auto Ins. Co., 316 S.C. 445, 450 S.E. 2d 582 (1984) and Crossley v. State Farm Mut. Auto Ins. Co., 307 S.C. 354, 415 S.E. 2d 393 (1992). The court disagrees.

The record is replete with evidence that creates a factual question for the jury whether [22] the Defendant acted unreasonably in rescinding the policy and denying Plaintiff's claims. The handwritten office

note on which Fortis seeks to rely was ambiguous on its face, in that it listed Plaintiff's age as 18 years old, which was his correct age on May 14, 2002, but not on May 14, 2001. That handwritten note does not reflect any diagnosis by a physician and does not contain any record of any treatment for an immune deficiency disorder. At the time of rescission, Fortis did not even know who authored the handwritten office note, and Fortis had no lab results at the time it cancelled Plaintiff's policy. Moreover, the sequencing of the Carolina Family Practice records places the handwritten note after the May 18, 2001 office visit for the college physical. The chronological sequence of those records raises an inference that the date on the handwritten note may be erroneous. An inference may also be drawn that Fortis had the May 14, 2002 LabCorp report and Dr. Shea's medical records which definitively establish the diagnosis date as being in 2002, at the same time Fortis obtained the handwritten office note on which it seeks to rely. The medical records Fortis admits receiving at the time it received the handwritten note included the physical examination for college dated May 18, 2001. The findings for that college physical do not reveal any HIV. Fortis had no billing claims in its possession related to diagnosis or treatment of HIV in 2001 or prior to May 14, 2002; following which it started receiving bills for both diagnosis and treatment thereof. Fortis had no medical record to match up with billing for May 14, 2002. Finally, there is evidence that Fortis would not have paid a bill if it was based on the same scant information set forth in the handwritten note.

In relying on Howard, supra, Defendant asserts that the only evidence of bad faith on its part came into existence after the date of its rescission on Sep-

tember 5, 2005. That assertion is incorrect. The court agrees with the holding in Howard, but that does not support Defendant's [23] position. There was overwhelming evidence of bad faith by Fortis at or prior to the September 5, 2002 recission letter, which raises a factual issue for the jury as to whether or not it was reasonable and in good faith for Fortis to rescind the Plaintiff's policy and deny his claims. Moreover, Defendant attempts to define the bad faith as occurring on September 5, 2002, when the letter notifying Plaintiff of the rescission was sent. However, evidence was presented upon which the jury could infer that the bad faith rescission was not complete until the second rescission committee review in June 2003 or later. Fortis' own witness testified that in rescission cases, an insured could appeal as many times as he wished, with no time limit, leaving an inference that Fortis itself considers no rescission final.[2]

It has long been the law of this state that in order to void a policy of insurance on the ground that fraudulent representations were made in the procuring of such policy, the burden of proof rests upon the insurer to show, by clear and convincing evidence, not only that the statements complained of were untrue, but in addition thereto that their falsity was know to the applicant, that they were material to the risk, were relied on by the insurer, and that they were made with intent to deceive and defraud the company. Lanham v. BlueCross and BlueShield of South Carolina Inc. 349 S.C. 356, 563 S.E. 2d 331 (2002). When Fortis rescinded and maintained the

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[2] There was no evidence presented, however, that Fortis' insureds are advised of this never-ending appeal process.

decision to rescind the Plaintiff's policy, it did not have clear and convincing evidence that the representations that Plaintiff made on the policy application were untrue, and Fortis had absolutely no evidence that the falsity was known to the applicant or that the representation was made with the intent to deceive or defraud the company.

Crossley, supra, also fails to support the Defendant's argument. In Crossley, State Farm [24] followed "standardized, published procedures to determine whether respondent's symptoms met criteria for denying coverage based on a pre-existing condition." There was no evidence in that case "to support respondent's claim that State Farm breached its implied covenant of good faith under the contract." Crossley v. State Farm Mut. Auto Ins. Co., 307 S.C. at 360, 415 S.E. 2d at 397. In contrast, Fortis had no written policies or procedures at all governing any step of the rescission process, and the record was replete with evidence of Fortis' bad faith prior to the time of rescission and maintaining the rescission.

Fortis also contends there is insufficient evidence of emotional distress damages. Fortis asserts that proof of a physical illness or bodily injury and proof of severe distress are required but absent. In contending that Plaintiff must prove a physical illness or other bodily injury and severe distress, Fortis relies on cases involving the tort of "outrage," or intentional infliction of emotional distress. Fortis ignores that this is a bad faith case, not a case alleging intentional infliction of emotional distress. The right to recover actual damages for emotional distress in a bad faith case was recognized in the case of University Medical Associates of the Medical University of South Carolina v. UnumProvident Corp., 335 F.

Supp. 2d 702 (D. S.C. 2004). As the Court in that case recognized, the Fourth Circuit has implicitly held that emotional distress damages related to a bad faith action in South Carolina are recoverable when the distress was related to the refusal to pay benefits. State Farm Fire and Cas. Co. v. Barton, 897 F. 2d 729 (4th Cir. 1990).

Numerous cases from other jurisdictions recognize that emotional damages are recoverable as an element of actual damages in a bad faith case, without proof of injury, illness, [25] or severe distress. See, e.g., Ace v. Aetna Life Insurance Company, 139 F. 3d 1241 (9th Cir. 1998); Goodson v. American Standard Insurance Company of Wisconsin, 89 P. 3" 409 (Col. 2004); Ingalls v. Paul Revere Life Insurance Group, 561 N.W. 2d 273 (N.D. 1997); Hangarter v. Paul Revere Life Insurance Company, 236 F. Supp. 2d 1069 (Cal. 2002); State Farm Mut. Auto Ins. Co. v. Campbell, supra; Washington v. Group Hospitalization , Inc., 585 F. Supp. 517 (U.S. D. C. 1984); Bibault v. Hanover Insurance Company, 417 A. 2d 313 (RI. 1980); Tran v. State Farm Mut. Auto Ins. Co., 999 F. Supp. 1369 (D.Ha. 1998); and Patel v. United Fire and Cas. Co., 80 F. Supp. 2d 948 (N. D. Ind. 2004).

Policy considerations for requiring severity of emotional distress to be shown in the "outrage" context do not support applying that requirement in the bad faith context. The basic assumption underlying limits to the tort of outrage is that emotional distress without physical injury or illness may be relatively trivial and too easily asserted.

> In contrast, when an insurance company wrongfully refuses to honor its obligations, emotional distress is a natural and believable

> response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. Ace v. Aetna Life Insurance Company, supra, 139 F.3d at 1250.
>
> Given that insureds purchase insurance policies to obtain financial security and peace of mind, emotional distress is a likely and foreseeable result of a bad faith denial of the benefits afforded under the contract. The action of the insurer causing anxiety, stress, inconvenience, and financial risk to the insured by delaying payment owed under the policy contravenes a fundamental benefit of obtaining the insurance. Goodson v. American Standard Insurance Company of Wisconsin, supra, 89 P.3d at 417.

"[A]n unreasonable denial of insurance benefits—a necessary element of every bad faith breach [26] of insurance contract—can cause anxiety, fear, stress, and uncertainty, even when the benefits are eventually paid." Id.

> An insured purchases insurance in the first place so as not to suffer such anxiety, fear, stress, and uncertainty. The fact that an insurer finally pays in full does not erase the distress caused by the bad faith conduct. Damages for emotional distress the insured proves are therefore available in actions for bad faith breach of insurance contract upon the showing of the insurer's liability. Id.

"Because a primary consideration in purchasing insurance is the peace of mind and security it will pro-

vide, an insured may recover for any emotional distress resulting from an insurer's bad faith." Jarchow v. TransAmerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470, 486 (1975); Ingalls v. Paul Revere Life Insurance Group, supra, 561 N.W. 2d at 283.

Defendant also argues that there was insufficient evidence that plaintiff's emotional harm was caused by its bad faith, relying on the case of State Farm Fire and Cas. Co. v. Barton, supra. Barton was a bad faith case arising out of a loss of Plaintiff's home due to fire. The only evidence presented at trial of Barton's mental anguish demonstrated emotional distress due to the loss of his home, and did not address the emotional harm, if any, resulting from the bad faith actions of the insurer. Barton is factually distinguishable from the present case. In this case there was considerable testimony about the Plaintiff's mental distress and emotional anguish arising from the bad faith of Fortis. Fortis argues that the Plaintiff's fear, worry, embarrassment, indignation, collection notices and loss of sleep were caused by contracting HIV, not by the bad faith of Fortis. The court disagrees. The evidence from Plaintiff, Mary Wiggins, and Debra Poston made a clear distinction between emotional distress Plaintiff experienced from learning he had HIV and the separate and additional mental distress and emotional anguish he [27] experienced from (a) losing his insurance coverage; (b) anxiety about whether he could obtain treatment for HIV; (c) fearing the consequences of not being treated; (d) being embarrassed at having to go to a public HIV/AIDS clinic rather than his private physician; (e) being falsely accused of insurance fraud; and (f) being distressed about receiving collection letters from physicians whose bills he could not afford to pay in full, and which should have been

covered in substantial part by his insurance coverage.

Finally, Fortis' argument regarding emotional distress damages incorrectly assumes the jury's $150,000 (One hundred fifty thousand dollars) actual damage award was solely compensation for emotional harm. There was ample evidence presented from which the jury could have awarded Plaintiff compensation for damages other than emotional harm.

Fortis also asserts that there is insufficient evidence to sustain the jury's punitive damages award. Fortis relies on the unpublished Fourth Circuit opinion of Tadlock Painting Company vs. Maryland Cas. Co., 93-2021, 1996 WL 532745, at 3 (4th Cir., September 20, 1996), which held that the court should have granted JNOV on the punitive damages award because it found "no evidence in the record that could lead a reasonable juror to conclude" that Defendant acted willfully or recklessly in its bad faith handling of Plaintiff's claim. Tadlock Painting, as an unpublished decision of the Fourth Circuit, has little persuasive authority. More importantly, however, it is factually distinguishable from this case, where overwhelming evidence was presented that Defendant acted willfully and recklessly in its bad faith rescission of Plaintiff's policy. The investigation by Fortis stopped upon discovery of suspicious evidence, and there was no investigation about whether the suspicious evidence was accurate or reliable. Fortis failed to conduct a thorough; objective and fair investigation and instead latched [28] onto one piece of false evidence to try to justify rescission. There was evidence from which the jury could infer Fortis either knew the truth all along or did not want to discover the truth. There was absolutely no evidence that

Plaintiff knew his representation was false (which it was not) or that he intended to deceive Fortis when he answered that he had not been diagnosed or received treatment for an immune deficiency disorder, because his answer was true. The secrecy of Fortis' rescission panel shows a consciousness of wrongdoing and a desire to avoid accountability. There were no rules, no minutes, no notes, and, in accordance with instructions from general counsel, not even a record of who was present. There were more than forty other customers, whose cases appeared before the rescission committee for review in no more than one and one-half to two hours, representing an average of three minutes or less per customer. Fortis did not inform Plaintiff that he had appeal rights, and it did not inform him that his appeal must be in writing to be considered. Fortis engaged in selective documentation, recording and/or maintenance of records of telephone calls after rescission. Fortis shredded, deleted, and used other documents not intended to be microfilmed. Fortis failed to provide legible copies of the Addendum to the referral form authored by Kate Stephens, which contains critical information about her consciousness of wrongdoing. Fortis ignored Mary Wiggins' telephone call on behalf of Plaintiff and refused her offer to fax medical records which would prove the rescission was based on bad information. Fortis ignored Sallie Phelan's letter and the attached Labcorp report. Fortis' underwriting supervisors testified that, even knowing what they now know, they would rescind the policy again if they had the chance. Such evidence represents clear and convincing evidence of Fortis' recklessness and willfulness.

[29] "If an insurance company could not be subjected to punitive damages it could inten-

> tionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest would enable the insurer to pressure an insured to a point of desperation; enabling the insurer to force an inadequate settlement or avoid payment entirely." John S. Trimper v. Nationwide Insurance Company, 540 F. Supp. 1188 (D.S.C. 1982)
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> "Unless it is held liable for such conduct, an insurance company can, with complete impunity, deny any claim it wishes, whether for valid reasons or not. The threat of punitive damages provides a suitable deterrent for willful withholding of benefits due under the contract." Brown v. South Carolina Insurance Company 284 S.C. 47, 324 S.E., 2d 641 (Ct. App. 1984)

Fortis argues that it was prejudiced by various procedural errors. The court disagrees. Fortis argues that it was error to allow post-rescission conduct to be admitted. However, in accordance with the case of Howard, supra, the court instructed the jury that such conduct was not probative of bad faith, but could only be considered for other purposes. Such evidence is probative of the willfulness and recklessness of Fortis as well as credibility of Fortis.

Moreover, there was a factual question presented as to when recission occurred. Defendant attempts to define the recission as occurring on September 5, 2002, when the letter notifying Plaintiff of the rescission was sent. However, evidence was presented

upon which the jury could infer that the bad faith rescission was not complete until the second rescission committee review in June 2003, or later.

Additionally, Fortis' key defense, that Plaintiff failed to mitigate his damages after [30] rescission, also undermines Fortis' position that the admission of post-rescission conduct was in error. By raising the failure to mitigate defense, Defendant opened the door to testimony from Plaintiff's witnesses regarding Plaintiff's efforts to have Fortis recognize the truth and reinstate the policy. Plaintiff is certainly permitted to offer evidence contrary to Defendant's mitigation defense. By arguing and attempting to prove failure to mitigate, certain aspects of Fortis' post- rescission conduct became relevant to the mitigation defense issues. It would be neither logical nor fair to allow Fortis to accuse Plaintiff of a failure to mitigate his damages and then preclude him from offering testimony to show his attempt to mitigate damages in trying repeatedly to convince Fortis its recission was based on erroneous information.

Fortis argues that the court improperly allowed evidence (a) of Fortis' actions with regard to "forty-five other insureds on the same day that Plaintiff's policy was rescinded;" (b) that the "corporate atmosphere" encouraged rescissions without thorough investigation; and (c) regarding post-claim underwriting. In reviewing those evidentiary decisions, the court sees no error. With regard to the evidence of forty-five other insureds' policies being reviewed on the same day that Claimant's policy was rescinded, that was probative of recklessness and willfulness in showing how little time the rescission committee allocated to consideration of each policy. Reference to those other policies reviewed during the same meet-

ing when Plaintiff's policy was rescinded has a clear and substantial nexus with the damage to the Plaintiff in this case. The court in State Farm vs. Campbell, supra, expressly recognized the appropriateness of such evidence: Even if Fortis' actions on those other policies were lawful under the law of other states, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the Defendant's action in the State where it is [31] tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 422, 123 S. Ct. at 1522.

Testimony from Plaintiff's insurance bad faith experts about the corporate atmosphere encouraging rescission and discouraging thorough investigations was also properly admitted because it is probative of bad faith, as well as willfulness and recklessness. It has an obvious nexus with the harm suffered by plaintiff. Also, one of the Gamble factors to be considered in a punitive damages review and one indication of reprehensibility under Gore and State Farm v. Campbell is whether there has been prior similar conduct. This evidence was probative of prior similar misconduct by Fortis, and was properly admitted.

As to Defendant's claim about evidence of post-claim underwriting, it is not necessary in this case to determine whether post-claim underwriting, in certain circumstances, may be proper. That is because Fortis, in this case, clearly used post-claim underwriting in bad faith. The evidence shows that Fortis commenced a fraud investigation not because of discovering anything suspicious about Plaintiff, but because Plaintiff contracted HIV. Fortis then stopped the investigation when it found one snippet of false

and unreliable information, taken out of context, on which it claimed a right to rely. In this case, if Fortis had investigated Plaintiff's medical records in existence at the time of his application, those medical records in existence would have confirmed the truthfulness of Claimant's representations about no diagnosis or treatment for immune deficiency disorder. "Normally, a layperson who pays his premium at the time an application for insurance is filed is justified in assuming that payment will bring immediate protection." Crossley v. State Farm Mutual Automobile Insurance Company, supra. Fortis rescinded Plaintiff's policy without conducting a fair, objective and [32] thorough investigation. Evidence of such bad faith post-claim underwriting was properly admitted.

Defendant also argues that the value of Plaintiff's gratuitous medical care should not have been admitted. The court disagrees. It was properly admitted as evidence of the value of claims that would have been submitted during the rescission period, which is relevant to actual damages. "The value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to injured person, as when a physician donates his services." Haselden, as Personal Representative of Hill v. Davis, 353 S.C. 481, 579 S.E. 2d 293, (2003). The value of those services is also relevant to the recklessness and willfulness of Fortis. The case of State Farm vs. Barton, supra, recognizes that an insurer's economic incentive or motive to deal in bad faith with its customer is probative of willfulness and recklessness. In this case, the value of Plaintiff's gratuitous care during the rescission period, plus the minimum value of expected future medical treatment for HIV over the remainder of Plaintiff's life expectancy did provide evidence of

the economic incentive and motive of Fortis to avoid substantial claims of approximately $1,080,000.00 (One million, eighty thousand dollars) related to HIV treatment alone. Plaintiff did not argue that Fortis would have had to pay the entire amount of those claims under the policy. To the contrary, Plaintiff acknowledged that there were substantial co-payment obligations. Despite substantial co-pays, however, the evidence of the minimal value of future medical care was relevant to the economic incentive of Fortis to avoid large claims by rescinding Plaintiff's policy.

Fortis also argues that testimony from Dr. Htay about the deleterious effects to Plaintiff from receiving no treatment for his HIV was irrelevant. The court disagrees. It was obviously [33] relevant to both actual and punitive damages. As to actual damages, it proved the beneficial effect of Plaintiff's actions to mitigate his damages by seeking and obtaining free medical care. As to punitive damages, it is relevant to the Plaintiff's vulnerability, the culpability and reprehensibility of Fortis' misconduct, the potential harm flowing from Fortis' misconduct, and the fact that Fortis' misconduct had ill effects not only on Plaintiff's economic interests but also threatened his health and life.

Fortis also argues that Professor John Freeman should have not been allowed to testify. The court disagrees. It contends he was a surprise witness not identified as an expert in response to Interrogatories. Although he was not formally identified, the court finds it came as no surprise to Defendant for Professor Freeman to be offered as an expert in the Rebuttal portion of Plaintiff's case. Early in litigation, Fortis made a Motion to Disqualify Plaintiff's Counsel

on the grounds that they had engaged in allegedly unethical conduct by "setting up" Fortis for bad faith by not including additional medical records as an enclosure to the demand letter from Sallie Phelan. In connection with that Motion hearing, Plaintiff filed and served an affidavit from Professor Freeman which both defended and commended the actions of Plaintiff's counsel. That Motion was denied. Just before trial Plaintiff made a Motion In Limine seeking to preclude Defendant from offering evidence that the Plaintiff's attorneys had acted unethically or improperly in any respect. Although the court had reservations about the questionable probative value and potential prejudice of such evidence, the court denied that Motion, in an effort to allow Fortis a full and wide-ranging opportunity to mount a defense. The primary witness used by Fortis to accuse Plaintiff's counsel of "setting up" Fortis for bad faith was Mr. Tom Hesse, an attorney and former insurance adjuster from Charleston. Fortis did not [34] identify Mr. Hesse as an expert in this case until just a couple of weeks before trial. When Fortis identified Mr. Hesse as an expert, it did not specify whether he would be testifying as an insurance expert only, or also as a legal expert about the conduct of Plaintiff's counsel. Mr. Hesse was made available to be deposed just days before trial. He was asked questions about Professor Freeman's affidavit, which he had read. When the court had a pre-trial conference with the attorneys on Friday afternoon before trial started, Plaintiff's counsel requested clarification as to whether or not the court would allow the defense to use Mr. Hesse as a legal expert to criticize the actions of Plaintiff's counsel. The court inquired of Fortis' counsel whether they intended to do so, and they denied any attempt to use Mr. Hesse as a legal

expert to challenge the ethical conduct of Plaintiff's counsel, but indicated they would ask Mr. Hesse whether he thought Plaintiff's counsel should have sent Fortis all of the medical records they had obtained, at the time Sallie Phelan sent her demand letter. When Fortis called Mr. Hesse as a witness during trial, Fortis' counsel went to great lengths to establish his credentials not only as an insurance expert, but also as an attorney with the specific experience of handling bad faith cases for both the Plaintiff and the insurance company. He criticized the failure of Plaintiff's counsel in June, 2003, to send Fortis all the medical records they had obtained. Mr. Hesse admitted on cross-examination that he had not even read the records which he contended should have been sent to Fortis and could not articulate how they could have possibly made a difference to Fortis' decisions about rescission. Yet, Mr. Hesse insisted that to send such records "couldn't have hurt anything", and the failure to send them showed Plaintiff's counsel did not really want reinstatement of plaintiff s policy, just a bad faith lawsuit. For these reasons, the court is convinced that Plaintiff was not in a position to make a decision about whether they would need [35] Professor Freeman as a witness until the pre-trial conference, at the very earliest, or more likely, not until Mr. Hesse testified during trial. Plaintiff tried repeatedly to keep out of evidence any matter relating to the conduct of Plaintiff's counsel, and it was Fortis that insisted on offering evidence supporting that line of defense. Once the court allowed Fortis through Mr. Hesse to criticize the actions and motivation of Plaintiff's counsel, in fairness, the court decided Plaintiff should be allowed to call Professor Freeman as a reply expert. The court offered Fortis an opportunity for its attorneys to

meet with Professor Freeman prior to his testimony, to ask him any questions they might have. They took advantage of that opportunity. Additionally, since September, 2004, Fortis and its counsel had been in possession and knew the contents of Professor Freeman's affidavit submitted during the earlier Motion hearing. The court is satisfied that allowing Professor Freeman to testify was the correct decision, and that Fortis was not surprised by his testimony or prejudiced in any way. His testimony was not a surprise or deviation from the contents of his affidavit. It would be particularly unfair and prejudicial to preclude Plaintiff from calling Professor Freeman as a rebuttal witness where Defendant waited so long to identify Mr. Hesse as a witness, and that Defendant was not informed as to the scope of Mr. Hesse's testimony prior to the pre-trial conference.

Fortis next argues that the court allowed unqualified experts to testify for the Plaintiff. The court disagrees. The insurance experts testifying for Plaintiff included Mr. Robert Hall and Mr. James Sadler. Both had many years of experience in the insurance field, dealing with the rescission of policies and bad faith issues. Although Mr. Hall's experience with the health insurance industry was outside the state of South Carolina, the court found him to be well qualified to testify on the subjects he addressed in his testimony. Although Mr. Sadler's [36] experience was primarily in property and casualty insurance, and less on the health insurance side, the court also found him to be well qualified concerning the subjects covered in his testimony. Bad faith rescission is not limited to one particular field of insurance. Insurance statutes in South Carolina which address unfair insurance practices make no distinction between health insurance and property and ca-

sualty insurance. Any perceived deficiency in the knowledge or experience of Plaintiff's experts about health insurance in South Carolina goes to the weight that should be accorded their testimony, and not to the admissibility thereof.

Fortis also complains about the evidence of its net worth and other financial information. Ability to pay punitive damages is one of the Gamble factors this court is directed to consider in the review of any punitive damages award. The evidence of Fortis' net worth and other financial information introduced through Dr. Oliver Wood is probative of Fortis' ability to pay a punitive damages award. Moreover, absent knowledge of the Defendant's financial status, a jury would not know how much punitive damages would be needed to deter Fortis from repeating its misconduct in the future. The type of evidence introduced regarding Fortis' financial status is virtually identical to that approved by our appellate courts in the cases of Cock-N-Bull Steak House, Inc., supra; and Orangeburg Sausage Co., supra.

Fortis also argues it was prejudiced by not being allowed to introduce the portion of the demand letter from Sallie Phelan which contained a monetary demand. Fortis argues that the amount of the settlement proposal is probative of Plaintiff's alleged failure to mitigate damages. I disagree. The court finds that the monetary demand is not probative of an alleged failure to mitigate damages. The court also finds that Plaintiff's counsel had absolutely no duty to provide Fortis with the fruits of their investigation prior to litigation. Fortis itself had the duty in good [37] faith to fairly, objectively and thoroughly investigate Plaintiff's representations and his intent before rescinding his policy on the basis of alleged mi-

srepresentation. The court agrees that Plaintiff had a duty to mitigate his damages, and the court finds he did. Both directly and through agents, he tried to convince Fortis of its mistake. But for Plaintiff's taking steps to obtain free medical care through Hope Health, his HIV would have become AIDS, and he would now be deceased. Rule 408 of the South Carolina Rules of Evidence directs that "evidence of conduct or statements made in compromise negotiations is likewise not admissible." While the language of the rule does permit exceptions when such evidence is offered for a valid purpose, my decision to exclude such evidence in this case was proper. Such evidence had no probative value, or if it had any possible probative value, which the court does not see, it was ever so slight and clearly outweighed by its potential for prejudice or confusion. Its admission could also have a chilling effect on parties' good faith attempts to resolve disputes before filing a lawsuit.

Fortis also complains about my decision to charge the jury on spoliation. Fortis asserts there was no evidence that Fortis destroyed any evidence, but the court disagrees. The record was replete with evidence of Fortis' desire for secrecy, concealment, shredded documents, deleted documents, missing entries on phone logs and recordings. It would have been reversible error for me not to give a spoliation charge. Stokes v. Spartanburg Regional Medical Center, 2006 WL 3692613 (S.C. App. 2006).

Fortis seeks JNOV based on its arguments reviewed in detail above. As the court is not persuaded by any of these arguments, the court denies that Motion.

Fortis also seeks a new trial absolute, arguing that the jury's verdict resulted from [38] passion,

prejudice or caprice. The court disagrees, and deny that Motion also. As mentioned above, the court finds there was ample justification for the jury's verdict both as to actual damages and as to punitive damages.

Fortis also seeks in the alternative a new trial nisi remittitur. Such is proper if the trial judge finds the jury was unduly liberal in its award of actual and/or punitive damages. For the reasons set forth above, the court finds that the jury award was not excessive or unduly liberal, but was proper, reasonable, and well justified by the evidence. The court therefore also denies the Motion for New Trial Nisi Remittitur.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as to the Defendant's Motion to Require Plaintiff to Elect Remedies, Plaintiff has elected to retain the award of actual and punitive damages in the bad faith cause of action; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Defendant's other post-trial Motions shall be, and they hereby are DENIED.

AND IT IS SO ORDERED, this 19 day of July, 2006.

[signed]

The Honorable Michael G. Nettles
Presiding Judge

APPENDIX C

[Order of the Supreme Court of South Carolina, denying petition for rehearing (December 17, 2009)]

The Supreme Court of South Carolina

December 17, 2009

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Re: Mitchell, Jerome v. Fortis Insurance Co.

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

December 17, 2009."

Also, enclosed is order issued by the Court denying the Motion to Stay the Issuance of Remittitur Pending Review in the United States Supreme Court.

The remittitur is today being forwarded to the lower court.

Very truly yours,

[signed]

CLERK

DES/jjp

cc: Stephan I. Voudris, Esquire
Edward L. Graham, Esquire
Brian D. Phelan, Esquire
Sallie P. Phelan, Esquire
David T. McDowell, Esquire
Alana K. Pulaski, Esquire
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Tina Cundari, Esquire
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